In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 401

JOHN WALDON, PETITIONER

v.

EDWIN B. SWOPE, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Ninth Circuit (R. 77) affirming an order of the District Court for the Northern District of California (R. 63) denying a petition for a writ of habeas corpus (R. 2-13). The case arose in the following manner:

1. On September 6, 1939, petitioner and two others were indicted in the United States District

Court for the Eastern District of Illinois in seven counts charging offenses against the postal service (R. 25-36). As indicated by the indictment, the charges grew out of an attempt by petitioner and two confederates to rob a United States mail car. The first three counts (R. 25-30) charged the defendants with destroying identified mail matter, in violation of Section 194 of the Criminal Code (18 U.S.C. [1940 ed.] 317).[1] Counts 4 and 5 (R. 30-33) charged separate assaults upon two custodians of the mail, Guy O'Hern and Earl Boothman, with intent to steal; count 6 (R. 33-34) charged the wounding of O'Hern with a dangerous weapon; and count 7 (R. 35-36) charged the jeopardizing of the life of Boothman by the use of a dangerous weapon, to wit, a revolver; all in violation of Section 197 of the Criminal Code (18 U.S.C. [1940 ed.] 320).[2]

In a pre-trial motion, petitioner, by his counsel challenged the petit jury panel on the ground that it contained no women (R. 15-16), and the challenge

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[1] Section 194 provided in pertinent part: "* * * whoever shall * * * destroy [any undelivered mail matter], shall be fined not more than $2,000 or imprisoned not more than five years, or both."

[2] Section 197 provided in pertinent part: "Whoever shall assault any person having lawful charge * * * of any mail matter * * *, with intent to rob, steal, or purloin such mail matter, * * * or shall rob any such person of such mail matter, * * * shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he shall wound the person having custody of such mail, * * * or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

was overruled (R. 16). The case then proceeded to trial, and petitioner was found guilty on all counts. On February 5, 1940, he was sentenced by District Judge Lindley to five years' imprisonment on each of counts 1, 2, 3, 4, and 5, the terms to be served consecutively, and to 25 years' imprisonment and a $10,000 fine on each of counts 6 and 7,[3] the latter two prison terms to be consecutive one to the other, but to run concurrently with the sentences imposed on the first five counts (R. 37-38), or a total prison sentence of 50 years.

On appeal to the Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed, *United States* v. *Waldon*, 114 F. 2d 982. On the appeal, petitioner being still represented by his trial counsel (cf. 114 F. 2d at 983 with R. 15), abandoned his challenge of the jury panel. Petitioner so concedes (Pet. 5-6). And the Court of Appeals stated in its opinion that: "[T]he only alleged error arises out of the admission of certain evidence * * *," although it also took occasion to observe that "All of the material allegations of each count of the indictment were abundantly supported by substantial evidence" (114 F. 2d at 983). On January 20, 1941, this Court denied a petition for a writ of certiorari, 312 U. S. 681.

2. During the month of September 1941, the

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[3] The imposition of the fines was unauthorized by the statute creating the offenses on which counts 6 and 7 were based (§ 197 of the Criminal Code, *supra*, fn. 2, p. 2). See *infra*, pp. 5, 8-9, 13.

clerk of the District Court for the Eastern District of Illinois applied a total of $883.50, which had been credited to petitioner's account in the clerk's "Trust Fund Collection Account," in part payment of the $20,000 in fines which that court had, erroneously (see fn. 3, *supra*, p. 3), imposed on petitioner on the sixth and seventh counts of the indictment (R. 18-19).

3. On September 5, 1944, petitioner filed in the Court of Appeals for the Seventh Circuit, the court which had affirmed his conviction four years earlier, a "Petition for Rehearing or for Leave to Proceed on Motion in the Trial Court for Resentence." In that document he "contended that only one offense was charged in the seven counts of the Indictment, and that the evidence was insufficient to support his conviction under Counts 1, 2 and 3" (R. 6-7). The Court of Appeals, on October 25, 1944, in an unreported *per curiam* opinion, denied the petition on the merits. It stated that the only important question sought to be raised was whether Section 197 of the Criminal Code (see fn. 2, *supra*, p. 2) authorized the imposition of consecutive sentences under counts 6 and 7. It held that it did. (See our memorandum in opposition to certiorari, No. 704, O.T. 1944, p. 3; see also *Waldon* v. *United States*, 84 F. Supp. 449, 450-451 (E.D. Ill.).) On February 26, 1945, this Court denied a petition for a writ of certiorari, 324 U.S. 847.

4. In the meantime, on September 29, 1944, District Judge Lindley, the judge who had presided at petitioner's trial, entered an order (R. 39-40) modifying the sentence which he had imposed on petitioner by eliminating the fines imposed on the sixth and seventh counts, the order reciting that the imposition of these fines had been inadvertent, being unauthorized by the statute defining the offenses charged in those counts, *i.e.*, Criminal Code, § 197, *supra*, p. 2, fn. 2. The order was entered *nunc pro tunc* as of February 5, 1940, the date of the original sentence (R. 40).[4]

5. Four years thereafter, on September 24, 1948, petitioner filed in the court of conviction, the District Court for the Eastern District of Illinois, a motion to set aside the judgment of conviction pursuant to § 2255 of revised Title 28 of the United States Code. While this motion is not contained in the present record, the nature of the contentions made in it (some of which challenged the validity of the judgment of conviction as a whole and others, the legality of portions of the sentence imposed)

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[4] The record does not reveal the circumstances under which Judge Lindley's attention was directed to the lack of statutory authority for the imposition of the fines. It does appear, however, that petitioner had been in correspondence with Judge Lindley in regard to his sentence shortly before the entry of the order vacating the fines (R. 8). The record also fails to disclose what steps, if any, have been taken toward restoring to petitioner the $883.50 utilized by the clerk of the trial court for partial payment of the fines (see *supra*, pp. 3-4). According to the petition for certiorari, "the government still holds it" (Pet. 8).

appears from the allegations of the habeas corpus petition which gave rise to the present proceeding (see R. 8-11), and also from the opinion of the court (Judge Lindley) disposing of the motion, *Waldon* v. *United States*, 84 F. Supp. 449. These contentions, so far as now relevant, may be summarized as follows:

(1) The conviction and sentence were invalid *in toto* because women were excluded from the jury panel from which the petit jury which tried petitioner was drawn (R. 9; 84 F. Supp. at 451);[5]

(2) The first three counts of the indictment (see p. 2, *supra*) charged but one offense; consequently, the imposition of consecutive sentences on those counts was unwarranted (R. 9; 84 F. Supp. at 451-452);

(3) The offense charged in count 4 (assaulting the mail-custodian O'Hern) "merged" with the offense charged in count 6 (wounding O'Hern); in like manner, the offense charged in count 5 (assaulting Boothman) "merged" with the offense charged in count 7 (jeopardizing the life of Boothman with a dangerous weapon); moreover, counts 6 and 7 themselves charged but a single offense.

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[5] It will be recalled that this was the contention, or one of the contentions, which petitioner, by his counsel, abandoned on his original appeal from the judgment of conviction (see p. 3, *supra*). It should be noted, too, that this was not among the contentions which petitioner sought to raise in the 1944 proceeding which he instituted in the Court of Appeals which had affirmed his conviction four years earlier (see p. 4, *supra*).

Consequently, count 4 could support no sentence distinct from that imposed under count 6; count 5 could support no sentence distinct from that imposed under count 7; and the imposition of consecutive 25-year sentences on counts 6 and 7 was unauthorized, *i.e.*, those two counts do not support more than a total of 25 years' imprisonment (R. 10; 84 F. Supp. at 452-455);[6]

(4) The erroneous imposition of fines on the sixth and seventh counts (see fn. 3, *supra*, p. 3) rendered the sentences on those counts void in their entirety. In the alternative, the imposition of fines on those counts, though unauthorized by the statute defining the offenses charged therein, exhausted the court's sentencing powers with respect to those counts, with the consequence that the prison sentences imposed on those counts were invalid. This conclusion was fortified, it was argued, by the fact that the fines imposed on counts 6 and 7 had been paid in part (see p. 4, *supra*), and, it was further argued, the order of September 29, 1944, setting aside the fines *nunc pro tunc* as of the original date

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[6] It should be noted that, since the consecutive 5-year sentences on counts 4 and 5 were made to run concurrently with the consecutive 25-year sentences on counts 6 and 7 (see p. 3, *supra*), the question of whether the count-4 and count-5 offenses "merged," respectively, with the count-6 and count-7 offenses did not, as pointed out by Judge Lindley (84 F. Supp. at 454), require decision. "The important question," as Judge Lindley observed (*ibid.*), was "whether separate consecutive sentences were properly imposed on Counts 6 and 7." This question, as we point out, *infra*, was resolved by Judge Lindley in petitioner's favor.

of sentence (*supra*, p. 5), was void because entered in petitioner's absence and without notice to him. (R. 10; 84 F. Supp. at 455.)

On May 12, 1949, the District Court (Judge Lindley), in an exhaustive opinion (84 F. Supp. 449), granted in part and denied in part the relief sought by the foregoing motion. With respect to the challenge of the composition of the petit jury, he ruled both that the contention was unsound on its merits and that it had, in any event, long since been waived by petitioner in consequence of his abandonment of the point on his original appeal (84 F. Supp. at 451). With respect to the contention that counts 1, 2, and 3 charged but a single offense, so that the cumulation of the 5-year sentences on those counts was unwarranted, he ruled that, while the question was not free of doubt, it was unnecessary to decide it in this case because, even if those counts did charge but one offense, that fact "would be of no aid to [petitioner] because these five year sentences were all made to run concurrently with the 25 year sentences on Counts 6 and 7" (84 F. Supp. at 451-452). With respect to the various contentions based upon the erroneously-imposed and subsequently-vacated fines on counts 6 and 7, Judge Lindley held that his error in imposing these fines did not vitiate the valid prison sentences on those counts; that the partial payment of the void fines did not entitle petitioner "to discharge from the valid part of his sentence"; and

that the absence of petitioner at the time the void fines were vacated was immaterial, since "[t]here is no requirement that a defendant be present when the court merely strikes a void part of the judgment" (84 F. Supp. at 455). Finally, with respect to the contention that the imposition of two consecutive 25-year sentences on counts 6 and 7 was unauthorized because those counts, allegedly, charged but a single offense,[7] Judge Lindley, having reached the conclusion, following a review of pertinent authorities, that the question was not free of doubt (84 F. Supp. at 454-455, 456), decided to "adopt that construction which is most favorable to [petitioner]"; *i.e.*, he ruled that those counts did charge but one offense, as claimed, and accordingly modified the sentence by directing that the two 25-year sentences imposed on those counts "run concurrently with each other and concurrently with the [consecutive 5-year] sentences imposed on Counts 1, 2, 3, 4, and 5, so that the total sentence of defendant will be 25 years in all" (84 F. Supp. at 456).[8]

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[7] For the reasons already explained (see fn. 6, *supra*, p. 7), there was no need for Judge Lindley to dispose of petitioner's related contention, *viz.*, that the offenses charged in counts 4 and 5 "merged" with the offenses charged in counts 6 and 7, respectively.

[8] Judge Lindley pointed out in his opinion that "the Court of Appeals from this circuit has already decided the issue [of whether counts 6 and 7 charged separate offenses and so would support consecutive sentences] adversely to defendant" (84 F. Supp. at 454; see p. 4, *supra*, where we made reference to the Court of Appeals' earlier decision on this point), so that "[u]ndoubtedly under the law in this circuit I would be justified in denying the motion entirely" (84 F. Supp. at

6. Petitioner took no appeal from the foregoing decision of Judge Lindley. Instead, on October 20, 1949 (R. 14), he brought the present habeas corpus proceeding in the District Court for the Northern District of California. It is clear from the petition for habeas corpus (R. 2-13; see, particularly, R. 11-12), and from petitioner's traverse (R. 51-62) to the Government's return (R. 22-50) to the show-cause order (R. 21-22), that the sole purpose of the habeas corpus proceeding was to relitigate the issues involved in the § 2255 proceeding before Judge Lindley in so far as they were resolved against petitioner in that proceeding. On November 23, 1949, the District Court denied the petition "upon the authority of," *inter alia*, Judge Lindley's decision in the § 2255 proceeding (R. 63). The Court of Appeals for the Ninth Circuit affirmed the order of denial (R. 77) in a *per curiam* opinion (R. 76) which merely cited the earlier decisions involving petitioner, including Judge Lindley's decision in the § 2255 proceeding. The petition for a writ of certiorari seeks review of the Ninth Circuit's judgment of affirmance.

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456). However, since the law in other circuits seemed to Judge Lindley to be contrary to the earlier Seventh Circuit decision in this case, with the result that "other circuits in a habeas corpus proceeding * * * might come to a different conclusion," he decided to "terminate further litigation and settle once and for all the defendant's contentions" by resolving the issue posed in petitioner's favor (*ibid.*).

ARGUMENT

It is clear that the petition for certiorari presents no question requiring further review by this Court. 28 U.S.C. 2255 provides:

> A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
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> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.
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> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Petitioner has already filed a motion pursuant to the foregoing section, asking the court in which

he was convicted to set aside, in whole or in part, the judgment of conviction and the sentence imposed upon him. Following painstaking consideration of all the contentions advanced by petitioner, Judge Lindley, the judge who presided at his trial and imposed sentence, granted in part and denied in part the relief sought. To the extent that Judge Lindley's order granted relief, his decision was highly favorable to petitioner, and was indeed more favorable than petitioner had any right to expect. His order modifying the 25-year sentences on counts 6 and 7 by directing that they run concurrently, rather than consecutively, had the effect of cutting in half the time which petitioner is required to serve. This action was taken, moreover, after the Court of Appeals having appellate jurisdiction over Judge Lindley's court had refused the very relief which Judge Lindley accorded, pursuant to its holding that the sentences on those counts had properly been directed to run consecutively. To the extent that Judge Lindley's order denied relief, it was plainly correct, as examination of his opinion discloses. Petitioner made no attempt to appeal from Judge Lindley's decision in so far as it was adverse to him. Instead, he sought to relitigate the same issues in the instant habeas corpus action. This he may not do, unless he makes some showing "that the remedy by motion is inadequate or ineffective to test the legality of his detention" (§2255, *supra*, last paragraph). See *Barrett* v. *Hunter*, 180 F. 2d 510 (C.A. 10), certiorari denied,

December 4, 1950, No. 3 Misc. Petitioner has made no such showing, and it is clear from the nature of his various contentions, all of which present naked issues of law, that any attempt to do so would have been unsuccessful. For these reasons, the petition for a writ of certiorari should be denied.[9]

Respectfully submitted.

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DECEMBER 1950.

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[9] Petitioner, of course, is entitled to recover, if he has not already done so, the $833.50 part-payment of the $20,000 in fines erroneously imposed under counts 6 and 7 of the indictment, which fines, as we have pointed out, were eliminated by Judge Lindley's 1944 order (*supra*, p. 5). But the matter of the recovery of this money can obviously not be raised in a habeas corpus proceeding.

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